FOR ARGUMENT



No. 87-107

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1988

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BRENDA PATTERSON,
*Petitioner,*
v.
McLEAN CREDIT UNION,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE RESPONDENT ON REARGUMENT

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The Equal Employment Advisory Council, with the written consent of the parties, respectfully submits this brief as Amicus Curiae in support of the Respondent. The letters of consent have been filed with the Clerk of the Court.

### INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary, nonprofit association organized to promote sound government policies pertaining to nondiscrimination in employment. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a board of directors composed of experts in equal employment opportunity and affirmative action. Their combined experience gives the Coun-

cil a unique depth of understanding of the practical, as well as the legal, aspects of equal employment policies and requirements. All of the Council's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

EEAC's members will be directly affected by a decision in this case on the issue of whether the Court should reconsider its decision in *Runyon v. McCrary*, 427 U.S. 160 (1976), which held that 42 U.S.C. § 1981 prohibits racial discrimination in the making and enforcement of private contracts. *See also, Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) (Section 1981 affords a federal remedy against discrimination in private employment on the basis of race.) Section 1981 plaintiffs may have their claims heard before a jury and, if successful, can receive extensive relief—including punitive damages and compensatory damages, such as for pain and suffering.

In resolving the issue of the reach of § 1981 and its impact on potential plaintiffs, the Court is likely to delve in some depth into the legislative history of § 1981 and the intent of the sponsors when the statute was enacted well over a century ago. That history will be covered extensively by the parties and other amici. EEAC's brief does not take a position on the meaning of this history or on whether *Runyon v. McCrary* should be overruled. EEAC submits, rather, that however the Court decides the case on the merits, reconsideration of *Runyon* is warranted because it will afford an opportunity for the Court to address and explicate, if not resolve, the practical effects of § 1981's coexistence with other, fundamentally inconsistent statutory schemes for remedying private employment discrimination.

EEAC's brief thus concentrates on the fact that § 1981 exists alongside of—and often in conflict with—numerous other federal, state, and local employment discrimination statutes, executive orders, wrongful discharge



causes of action and collective bargaining agreements, all of which may provide an avenue of relief for an individual for the same alleged racial discrimination.

More specifically, while this Court has noted that § 1981 and Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, *et seq.* provide "independ[ent] . . . avenues of relief" (*Johnson*, 421 U.S. at 460), experience over the past decade has shown that those avenues not only are independent, but often are fundamentally conflicting and antithetical. Thus, § 1981 relies exclusively on private individual court suits, spurred by undefined damages designed to punish the employer and provide damages for pain and suffering. Title VII eschews immediate resort to the courts, requires administrative investigation and conciliation, and imposes damages which are primarily of a "make whole" nature.

The fundamental policy and enforcement problems caused by this legislative dichotomy never were addressed in a meaningful manner, either when Title VII was enacted in 1964, when it was amended in 1972, or in prior decisions of this Court. What this Court says in this case about the existing civil rights structure in terms of its effects on enforcement, conciliation, efficiencies, inconsistencies and impact on the judiciary, will be extremely important not only for the enforcement of those statutes, but also in any future Congressional debates related to this Court's decision.[1]

The briefs in *Johnson v. Railway Express* did not address in any detail the negative effect on public anti-discrimination policy of conflicting side-by-side statutory schemes. Rather, the issue in that case was limited to "whether the timely filing of a [Title VII] charge of employment discrimination . . . tolls the running of the period of limitation applicable to an action based on the

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[1] *See* Brief of 66 Members of the United States Senate and 118 Members of the United States House of Representatives as Amici Curiae in Support of Petitioner.

same facts, instituted under 42 U.S.C. § 1981." 421 U.S. at 455.

Moreover, although a number of lower courts had ruled that § 1981 prohibits private employment discrimination on the basis of race (*see Johnson*, 421 U.S. at 460-61 n.6), the Respondents in *Johnson* "[did] not challenge those decisions [t]here, and therefore the question of the scope of Section 1981 [was] not before the Court." Brief for the United States as Amicus Curiae in *Johnson v. Railway Express*, at 12 n.6. Thus, the Court's statements in *Johnson* that § 1981 applies to private employment discrimination were not addressing the precise issue upon which review had been granted and, consequently, many of the arguments advanced in this brief were not briefed to the Court. In short, there has not been a "full airing of all the relevant considerations" (*Monell v. Dept. of Social Services of City of N.Y.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring)) that bear on the relationship between Title VII and § 1981.

In addition, in deciding this case, the Court should keep in mind that aside from Section 1981, numerous other avenues of relief are available for race-based employment discrimination. *See Patterson v. McLean Credit Union*, 108 S.Ct. 1419, 1422 (1988) (dissenting opinions of Justices Blackmun and Stevens). For example, an individual employed by a federal contractor with at least 15 employees has numerous independent avenues of relief wholly apart from § 1981, each of which may be pursued *simultaneously*. These include:

—Title VII;

—Executive Order 11246;

—Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.* (if the employer receives federal financial assistance);

—anti-discrimination statutes in virtually every State, and numerous local statutes and ordinances;



—state and local executive orders prohibiting discrimination and requiring affirmative action;

—state court suits (where available) for wrongful discharge based upon contract, tort or other theories (often with jury trials and punitive and compensatory damages);[2] and

—grievance proceedings, arbitration and federal suits under § 301 of the National Labor Relations Act for breach of collective bargaining obligations where a union contract exists.[3]

Thus, at least with respect to employment discrimination, even if *Runyon v. McCrary* is reversed, employers still will have substantial incentives to avoid employment discrimination.

EEAC is well-qualified to brief the Court on the implications of its decision in this case on federal civil rights enforcement, having participated as amicus curiae in the initial briefing of this case, as well as in numerous other cases involving § 1981 and Title VII issues.[4]

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[2] *See Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988), which increases the ability of plaintiffs to sue under various state wrongful discharge theories even if a collective bargaining agreement also applies to the same situation.

[3] *See Alexander v. Gardner-Denver Company*, 415 U.S. 36 (1974) (right to sue under Title VII not encumbered by prior submission of claim to arbitration); *International Union of Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1976) (filing a grievance under a collective bargaining agreement does not toll Title VII's charge filing requirements); and *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984) (no preclusive effect need be given to labor arbitration awards).

[4] *See, e.g., Goodman v. Lukens Steel Company*, 107 S.Ct. 2617 (1987) (Section 1981 statute of limitations); *St. Francis College v. Al-Khazraji*, 107 S.Ct. 2022 (1987) (Section 1981 and national origin discrimination); *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982) (Section 1981 standard of proof); *Great American Savings & Loan Assn. v. Novotny*, 422 U.S. 366 (1979) (42 U.S.C. § 1985(3) does not apply to a conspiracy to violate Title VII); *IUE, Local 790 v. Robbins & Meyers*, 429

## STATEMENT OF THE CASE

This case arose out of a race-based discrimination suit filed by Brenda Patterson under 42 U.S.C. § 1981. She alleged that she had been a victim of race discrimination by her employer. In particular, she alleged that she was subjected to racially-motivated harassment and that she was denied a promotion because of her race. Her claim of promotion discrimination was submitted to a jury, which returned a verdict for the employer. The correctness of the district court's jury instruction on the promotion issue was considered in the first hearing before this Court, and EEAC's initial brief argued that the instruction was correct.

Also at issue was whether the Fourth Circuit was correct in ruling that a claim for racial harassment is not cognizable under § 1981. These issues were not addressed by EEAC nor resolved by the Court, which instead ordered reargument on the following question:

> Whether or not the interpretation of 42 U.S.C. § 1981 adopted by this Court in *Runyon* v. *McCrary*, 427 U.S. 160 . . . should be reconsidered.

In dissenting from this order, Justice Blackmun stated that it is "probably true that most racial discrimination in the employment context will continue to be redressable under other statutes. . . ." *Patterson* v. *McLean Credit Union*, 108 S.Ct. 1419, 1422 (1988). Similarly, Justice Stevens' dissenting opinion pointed out that ". . . the present case involves a claim of discrimination in the workplace, an area of the law where there is substantial overlap between 42 U.S.C. § 1981 and Title VII . . . 42 U.S.C. § 2000e, et seq." *Id.* It is the interrela-

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U.S. 229 (1976); *EEOC* v. *Commercial Office Products Company*, 56 U.S.L.W. 4424 (U.S., May 17, 1988) (analysis of Title VII's requirement of deferral to state agencies as an alternative to court suit); and *Lingle* v. *Norge Division of Magic Chef, Inc.*, 107 S.Ct. 1877 (1988) (effect of federal law on state wrongful discharge suits).



tionship between these two statutory schemes that is the primary focus of this amicus curiae brief.

## SUMMARY OF ARGUMENT

In discussing the applicability of § 1981 to employment discrimination, this Court has stated that § 1981 and Title VII provide "independ[ent] avenues of relief" (*Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975)). The Court, however, also has recognized that the filing of a § 1981 suit can deter Title VII conciliation and that such a lawsuit is "privately oriented and narrow, rather than broad, in application, as successful [Title VII] conciliation tends to be." *Id.*, 421 U.S. at 461.

Thus, this and other courts often have expressed concerns that because of Title VII's administrative requirements, § 1981 will, "by perverse operation of a type of Gresham's law" drive the use of Title VII "out of currency." *Brown* v. *General Services Administration*, 425 U.S. 820, 833 (1976). *See also Great American Federal Savings & Loan Association* v. *Novotny*, 442 U.S. 366, 376 (1979) ("Perhaps most importantly, the complaint could completely bypass the administrative process which plays such a crucial role in the scheme established by Congress in Title VII."). Because § 1981 was not widely used in the employment context until *after* the 1972 Title VII debates, Congress has never addressed meaningfully the fundamental inconsistencies between the two statutes.

Moreover, this Court's Title VII decisions provide many benefits for charging parties. Liberal construction of time filing requirements, and the EEOC's investigatory and enforcement authority, have assured that the EEOC—unlike private litigants—can pursue enforcement actions that "are not limited to the claims presented by the charging parties" and are unencumbered by the limited class representative requirements of Rule 23, Fed. R.Civ. Pro. *General Telephone Company of the Northwest, Inc.* v. *EEOC*, 446 U.S. 318, 331 (1980).

Private plaintiffs alleging employment discrimination have multiple avenues of relief besides § 1981, including Title VII, state and local laws and executive orders, wrongful discharge suits and collectively bargained dispute-resolution mechanisms. But as this brief shows, Title VII and § 1981 often work at cross purposes. As a result, the use of § 1981 to cover employment discrimination may be impeding Congressional intent that Title VII be the primary means of dealing with employment discrimination on the federal level.

## ARGUMENT

### I. THIS COURT SHOULD RECONSIDER *RUNYON v. McCRARY* IN ORDER TO ADDRESS THE FUNDAMENTAL, UNRESOLVED CONFLICT BETWEEN THE LAWSUIT-ORIENTED APPROACH OF SECTION 1981 (WITH JURY TRIALS AND PUNITIVE AND COMPENSATORY DAMAGES), AND THE ADMINISTRATIVE CONCILIATION REQUIREMENTS OF TITLE VII—A CONFLICT THAT INTERFERES WITH CONGRESS' INTENTION THAT TITLE VII BE THE PRIMARY MECHANISM TO RESOLVE CLAIMS OF RACE-BASED EMPLOYMENT DISCRIMINATION

#### A. Section 1981 Was Not Generally Recognized As An Available Remedy For Employment Discrimination When Congress Enacted And Amended Title VII

Despite the extensive arguments over the legislative history of the 1866 Civil Rights Act set out in the briefs of Petitioner and supporting amici, there is no real question that § 1981 "lay essentially dormant" for more than a century before it was used in any meaningful manner in the employment discrimination context.[5] Indeed, it was

[5] Richey, *Manual on Employment Discrimination and Civil Rights Actions in the Federal Courts*, at D-1 (1987). Unlike Title VII, Section 1981 does not mention employment discrimination and has no administrative enforcement mechanism. Rather, immediate resort to the federal courts is required under § 1981, which provides:

[Continued]



not until the 1968 decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that the Court held that § 1981 provided a right to an individual to sue for racial discrimination in *private*, as well as public, sale or rental of property. Until that decision, there had been no conclusive ruling by the Court that § 1981 was not limited to contract-related discrimination by public entities.

Moreover, it was not for another seven years, until 1975, that the Court stated that § 1981 affords a federal remedy against discrimination in private employment on the basis of race. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975). Thus, this Court's ruling on this crucial issue was not handed down until *after* the Congressional Title VII debates in 1964 and 1972—the only two times when Congress has taken a comprehensive look at race-based employment discrimination.

Any meaningful discussion of the use of § 1981 to remedy employment discrimination must recognize that until the mid-1960's, there was—as a practical matter—no useful federal remedy for employment discrimination. Indeed, although the Fifth Circuit preceded this Court in finding a § 1981 cause of action for employment claims, it also limited back pay under § 1981 to the effective date of Title VII. *See Johnson v. The Goodyear Tire & Rubber Company*, 491 F.2d 1364, 1378 (5th Cir. 1974). The Fifth Circuit stated:

> We think that a balancing of equities presented by the whole area of employment discrimination demands that back pay claims under § 1981 be limited to July 2, 1965, the effective date of Title VII. *It was not until that date that the employers clearly*

[5] [Continued]

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

> *became aware that they would be held accountable for employment discrimination.* Our revitalization of § 1981 did not occur until 1970. In our opinion, it would be unjust to impose liability before the effective date of Title VII even though we are aware that the two provisions have been interpreted to be procedurally independent in our Circuit.

491 F.2d at 1378-79 (emphasis added). Thus, in the 1970's, there was no experience as to how effectively § 1981 would work in carrying out a long-dormant Congressional mandate to eliminate private employment discrimination. This Court may consider on rehearing whether there was, in fact, any such mandate from the Congress that passed the Reconstruction-Era Civil Rights statutes in the mid-1860's. But, regardless of how the Court ultimately rules, its reconsideration of that issue should not be undertaken in a historical vacuum. The Court is now in a position to assess the practical implications of § 1981's coexistence with other, more recently enacted remedies for employment discrimination, and this case presents a rare vehicle in which to do so.

### B. The Remedial Schemes Established By Section 1981 And Title VII Have Fundamental Inconsistencies

#### 1. *Section 1981 Relies On Immediate Resort To Litigation And Provides Remedies That Are Fundamentally Punitive And Undefined*

Section 1981 relies for its enforcement on direct resort to civil litigation. Its remedies are essentially punitive and undefined. It provides several important procedural inducements to plaintiffs that are not available to Title VII charging parties. These inducements include:

—punitive damages;

—compensatory damages (including damages for pain and suffering;

—jury trials;

—longer statutes of limitations;

—no need to wait for the EEOC to investigate the charge and issue a right-to-sue letter; and



—no limitation on back pay to two years prior to the filing of a charge.[6]

In practice, these procedures are often used to extract from defendants settlements that bear little relationship to the degree of damages suffered by the plaintiff.

As one commentator has pointed out, the "fiscal consequences" of proceeding under 1981 can be enormous. Brooks, *Use of the Civil Rights Acts of 1866 and 1871 to Redress Employment Discrimination*, 62 Cornell L. Rev. 258, 285 (1977). "Compensatory and punitive damages—both available under the Reconstruction Acts—can easily amount to millions of dollars." *Id.*, at 285. Thus, the possibility of recovering such damages "encourages plaintiffs to seek redress in the many cases where actual injury is too small to warrant a suit for compensatory damages alone." *Id.*, at 287.

Indeed, because of the large potential damages awards, there is a great deal of truth to the now-standard irony shared by employment discrimination litigators that it is virtually malpractice for a plaintiff's attorney to file a Title VII charge with the Equal Employment Opportunity Commission (EEOC) in a race-discrimination case, instead of filing a federal or state court suit under § 1981 and some theory of wrongful discharge where available.[7]

Moreover, even when a Title VII charge is filed, a § 1981 complaint also may be filed as the same time, or at some later time before the longer § 1981 limitations

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[6] *See* Brief for Petitioner on the merits, at pp. 58-61; *Johnson v. Railway Express*, 421 U.S. at 460 (jury; damages; back pay); and *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617 (1987) (limitations period). *See also*, Reiss, *Requiem for an "Independent Remedy": The Civil Rights Acts of 1866 and 1871 as Remedies for Employment Discrimination*, 50 S.Cal.L.Rev. 961, 965-970 (1977).

[7] *See* Brooks, 62 Cornell L.Rev. at 260, which argued that "it is prudent for an attorney to file suit under more than one statutory provision, so as to assure survival of the action beyond the pretrial stage and maximize the chances for success at trial.

period runs out. As was pointed out to the Court in *Johnson v. Railway Express*:

> the fact is that Section 1981 is commonly thrown into complaints based on Title VII principally for the purpose of avoiding defects in the complaint arising out of failure to comply with one or more of the requirements of Title VII.[9]

The Title VII charge may be broader in scope than the § 1981 complaint, as, for example, when a charge alleging race and sex discrimination under Title VII is filed concurrently with a § 1981 race claim. This may lead to procedural complications if the cases are consolidated for trial. For example, the Court may determine that the race discrimination issues are appropriate for jury consideration but the sex discrimination claims are not.

Another common plaintiff's tactic is to file a Title VII charge, thereby triggering an EEOC investigation which is conducted at agency expense and which costs nothing to the chargeing party or his attorney. Often this investigation is lengthy and complex and a great deal of information is developed. The information in the EEOC's investigative files must be turned over to the charging party or his attorney once his Title VII suit is "instituted." *See* 29 C.F.R. 1601.22 (1979); and *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981).

The information developed by EEOC thus can be used as the basis for the plaintiff's private lawsuit. Typically, the plaintiff's complaint will be based on § 1981, as well as Title VII. Since the limitations period for filing a

[9] Brief for Respondents Brotherhood of Railway Clerks Tri-State Local and Brotherhood of Railway Clerks Lily of the Valley Local, p. 16, *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). *See also* Reiss, 50 S.Cal.Rev. at 1025:

> The primary present use of the Civil Rights Acts of 1866 and 1871, therefore, is simply as a safeguard against the procedural pitfalls of Title VII, in areas covered by that statute. No plaintiff should fail to allege claims under one or more of these statutes *and* Title VII, whenever applicable. (Emphasis in original)



§ 1981 suit often will not run out until after the EEOC investigation is complete, the case can proceed through the EEOC investigation and conciliation periods before the employer is even aware that a § 1981 suit is contemplated.

A plaintiff thus can obtain the relevant information for a private suit without incurring substantial attorney's fees for this investigation that would not be awardable unless he prevailed at trial. See 42 U.S.C. § 1988, which provides attorney's fees only to a "prevailing party." This tactic essentially subverts Title VII's emphasis on conciliation and administrative resolution of charges.

As this discussion demonstrates, § 1981 provides significant inducements to plaintiffs and their counsel, who, not surprisingly, regularly resort to § 1981 even when proceeding simultaneously under Title VII. But, as now shown, encouraging such dual proceedings tends to thwart the public interest and the goals established by Congress in enacting Title VII.

### 2. *Title VII Discourages Initial Resort To The Federal Courts And Establishes Voluntary Compliance And Conciliation As The Nation's Primary Policy For Eliminating Employment Discrimination*

Even though this Court has stated that Title VII and § 1981 provide independent avenues of relief, it also has recognized the inherent conflict between these statutes. Thus, the Court stated in *Johnson v. Railway Express*, 421 U.S. at 461:

> We recognize, too, that the filing of a lawsuit [under § 1981] might tend to deter efforts at conciliation, that lack of success in the legal action could weaken the Commission's efforts to induce voluntary compliance, and that a suit is privately oriented and narrow, rather than broad, in application, as successful conciliation tends to be.

A review of Title VII's administrative scheme demonstrates the fundamental differences from § 1981.

The primary focus of Title VII is on administrative enforcement and voluntary compliance, not on federal court litigation. Thus:

> In the Equal Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing. The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." If the EEOC finds that there is reasonable cause it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." When "the Commission [is] unable to secure . . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent . . . ."

*Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355, 359-60 (1977) (footnotes omitted).

Indeed, Title VII not only provides for prior review by the EEOC; it also contains the requirement that state agencies be given:

> an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated. . . . Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed, or until 60 days had passed, whichever came sooner.



*Mohasco Corp. v. Silver*, 447 U.S. 807, 821 (1980) (emphasis added). *Accord, Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755 (1979) (deferral provisions give state agencies an opportunity "to resolve problems of employment discrimination and thereby to make unnecessary . . . resort to federal relief by victims of discrimination").

Thus, Section 706(b) of Title VII was "clearly intended to increase the role of States and localities in resolving charges of employment discrimination." 447 U.S. at 820.

> Congress viewed proceedings before the EEOC and in federal court as supplements to available state remedies for employment discrimination. Initial resort to state and local remedies is mandated, and *recourse to the federal forums is appropriate only when the State does not provide prompt or complete relief.*

*New York Gaslight Club, Inc., v. Carey*, 447 U.S. 54, 65 (1980) (awarding Title VII attorney's fees to the charging party for legal work performed before the state deferral agency) (emphasis added).

In addition to this preference for administrative enforcement, Title VII does not provide for a jury trial, and its "make whole" remedial provisions do not provide for punitive or compensatory damages (such as damages for pain and suffering.) *See Richerson v. Jones*, 551 F.2d 918, 926-28 (3d Cir. 1977), and cases cited. Instead, Title VII's thrust is to encourage conciliation and resolution without resort to federal court litigation.

> Congress enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin. . . . *Cooperation and voluntary compliance were selected as the preferred means for achieving this goal.* To this end, Congress created the Equal Employment Opportunity Commission and established a procedure whereby existing state and local equal employment

> opportunity agencies, as well as the Commission, would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit. In the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103, Congress amended Title VII to provide the Commission with further authority to investigate individual charges of discrimination, to promote voluntary compliance with the requirements of Title VII, and to institute civil actions against employers or unions named in a discrimination charge.

*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (emphasis added). *Accord, Ford Motor Co. v. EEOC*, 458 U.S. 219, 228 (1982), (voluntary compliance can end "discrimination far more quickly than could litigation proceeding at its often ponderous pace").

As we will show more fully below, these fundamental differences between Title VII and § 1981 were never fully considered by Congress or by this Court in *Johnson*, but they have bedeviled the courts ever since § 1981 came to be recognized as providing a remedy for race-based employment discrimination.

### C. The Conflict Between The Two Remedial Schemes Was Not Meaningfully Addressed In The Title VII Debates in 1964 and 1972

Because § 1981 has only recently been applied to private contracts, there was very little judicial analysis of its impact on employment discrimination in existence when Congress enacted and amended Title VII. Thus, it is not surprising that the Congressional Title VII debates provided little insight into whether § 1981 and Title VII were compatible. To read the briefs of Petitioner and supporting amici, one would gain the impression that Congress had made a reasoned policy decision after taking the Reconstruction Era legislation into account. That, however, simply was not the case.

The two most pertinent pieces of legislative history were the rejection of two amendments—the Tower



Amendment in 1964 and the Hruska Amendment in 1972. In neither instance did Congress show any awareness of the problems it was creating by the juxtaposition of two quite different statutory schemes.

#### 1. *The 1964 Tower Amendment*

The Petitioner argues that when Congress in 1964 rejected Senator Tower's Amendment which would have made Title VII the exclusive remedy for employment discrimination, it was "clear that members of the Senate, including Senator Ervin, believed that § 1981 already prohibited such private discrimination," and that the Senate's rejection of the Tower Amendment, "ma[de] clear its intent to retain other statutory remedies." Petitioner's Brief on Reargument at 76.

The Tower Amendment, however, was not directed at limiting *private* suits brought under § 1981—indeed, § 1981 was not even mentioned in the debates. 110 Cong. Rec. 13650-13652 (1964). Rather, the Tower Amendment was intended to "preclude the harassment of businessmen, companies, or unions by more than one Federal agency." 110 Cong. Rec. at 13650. The Amendment stated:

> Exclusive Remedy
>
> Sec. 717. Beginning on the effective date of Section 703, 704, 706, and 707 of this title, as provided in section 716, the provisions of this title shall constitute the exclusive means whereby any *department, agency, or instrument in the executive branch of the Government or any independent agency* of the United States, may grant or seek relief from, or pursue any remedy with respect to, any employment practice of any employer, employment agency, labor organization, or joint labor-management committee covered by this title, if such employment practice may be the subject of a charge or complaint filed under this title.

*Id.* Thus, the amendment had nothing to do with privately-filed court suits: it was directed only at preventing simultaneous investigations by "EEOC and the vari-

ous departments charged with enforcing the provisions of the President's Equal Employment Commission's rules for Federal contractors." *Id.*

### 2. *The 1972 Hruska Amendment*

In the 1972 Title VII debates, the Senate rejected an amendment proposed by Senator Hruska to the effect that a charge filed under Title VII "shall be the exclusive remedy of any person claiming to be aggrieved by an unlawful employment practice of an employer, employment agency or labor organization." Debates on Hruska Amendment to Title VII of the Civil Rights Act of 1964, *reprinted in* Legislative History of the Equal Employment Act of 1972, 1382 (1972). At several points, § 1981 was mentioned as an alternative avenue of relief that was not to be eliminated. *Id.* at 1402, 1403 (citing *Jones v. A. Mayer*). Also the House Report cited to two cases which had applied § 1981 to private employment discrimination. *See Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970); and *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971).

But the debates on this point were fairly perfunctory, and—except for the differences in statutes of limitations (118 Cong. Rec. 3961-62 (1972))—did not delve into the divergent paths taken by these two statutes, nor into the problems which this divergence could cause. Moreover, the brief reference to the decided cases mentioned above failed to point out that the federal courts had immediately recognized the potential problems that Congress had created and then overlooked.

### B. Early Lower Court Decisions Recognized The Fundamental Problems Caused By The Coexistence Of § 1981 and Title VII

Around the time that Congress amended Title VII in 1972 and expanded EEOC's investigatory and enforcement authority, a number of lower courts found that § 1981 could be used as a parallel means to pursue em-



ployment discrimination.[9] Unlike Congress, however, these courts immediately were bothered by the inconsistencies in the statutes and tried to find a way to accommodate the two in order to preserve Title VII's purposes of voluntary compliance and conciliation.

Thus, several circuits held that "while Title VII can impose no absolute procedural prerequisites on section 1981 litigation, allowing premature diversion of employment discrimination claims into court, would weaken Title VII conciliation efforts." *Developments in the Law—Section 1981*, 15 Harv. C.R.-C.L.L. Rev. 29, 240-241 (1980).[10]

The most thoughtful discussion was found in *Waters v. Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476, 486-88 (7th Cir. 1970), *cert. denied sub nom. International Harvester Co. v. Waters*, 400 U.S. 911 (1970). Although recognizing that Congress had allowed Title VII charging parties to by-pass the EEOC and go directly to court under Title VII, the *Waters* decision also stated that:

> Despite these indications we are convinced that had Congress been aware of the existence of a cause of action under section 1981, the absolute right to sue

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[9] A number of these cases were cited in *Johnson v. Railway Express*, 421 U.S. at 460-61 n.6. *See Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1971), *cert. denied*, 409 U.S. 982 (1972); *Caldwell v. National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied* 405 U.S. 916 (1972); *Long v. Ford Motor Co.*, 496 F.2d 500 (6th Cir. 1974); *Waters v. Wisconsin Steel Works*, 427 F.2d 476 (7th Cir.), *cert. denied sub nom. International Harvester Co. v. Waters*, 400 U.S. 911 (1970); *Brady v. Bristol-Meyers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C. Cir. 1973).

[10] *See also, Exhaustion of Remedies under Title VII (Equal Employment Opportunity) of Civil Rights Act of 1964 (42 USCS §§ 2000e, et seq.) as Prerequisite to Maintenance of Action Under 42 USCS § 1981 for Employment Discrimination*, 23 ALR Fed 895, 903-916.

> under that section would have been modified. Throughout the legislative history of Title VII, Congress expressed strong preference for resolution of disputes by conciliation rather than court action. Conciliation was favored for many reasons. By establishing the EEOC Congress provided an inexpensive and uncomplicated remedy for aggrieved parties, most of whom were poor and unsophisticated. Conciliation also was designed to allow a respondent to rectify or explain his action without the public condemnation resulting from a more formal proceeding. Furthermore, the absence of direct government coercion was thought to lessen the antagonism between parties and to encourage reasonable settlement. *The need for voluntary compliance was stressed since more coercive remedies were likely to inflame respondents and encourage them to employ subtle forms of discrimination.*

427 F.2d at 486-87 (emphasis added).

Because Congress placed such strong emphasis on conciliation, the *Waters* decision concluded: "we do not think that aggrieved persons should be allowed intentionally to by-pass the Commission without good cause." *Id.* Thus, the court held that "an aggrieved person may sue directly under section 1981 if he pleads a reasonable excuse for his failure to exhaust EEOC remedies." *Id.*

The other courts of appeals did not go so far as to require the § 1981 plaintiff to prove that he had a reasonable excuse for not exhausting Title VII remedies. However, in order to encourage the use of EEOC conciliation facilities, they either ordered or suggested that the district courts stay the proceedings in the § 1981 suit until conciliation procedures under Title VII were carried out.[11] Some of the district courts discussed the

[11] *See Young v. International Telephone & Telegraph Co.*, 438 F.2d at 764; *Caldwell v. The National Brewing Company*, 443 F.2d at 1046; *Sanders v. Dobbs Houses, Inc.*, 431 F.2d at 1101; *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d at 797. *See also Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d at 1379 (Back pay under § 1981 cannot begin prior to the effective date of Title VII).



problem in harsher terms, recognizing that to entertain claims simultaneously under Title VII and § 1981 "would make Title VII . . . a redundancy and in large part an absurdity." *Smith v. North American Rockwell—Tulsa Div.*, 50 F.R.D. 515, 518 (N.D. Okla. 1970), *quoted on this point in Taylor v. Safeway Stores, Inc.*, 333 F. Supp. 83, 87 (D. Colo. 1971).[12]

### E. This Court's Decisions Construing Other Reconstruction-Era Civil Rights Statutes Further Recognized That Court-Oriented Private Lawsuits Imperil The Purposes Of Title VII

As noted above, this Court's decision in *Johnson v. Railway Express* pointed out the negative impact that § 1981 employment discrimination litigation would have on the proper enforcement of Title VII. But the Court concluded that because Congress had made the choice to permit two avenues of relief, the Court was "disinclined. . . to infer any positive preference for one over the other. . . ." 421 U.S. at 461. But when construing other Reconstruction-Era statutes, the Court has been quite inclined to preserve the Title VII administrative enforcement system to the exclusion of private litigation.

#### 1. Brown v. GSA

Thus, in *Brown v. General Services Administration*, 425 U.S. 820 (1976), the Court held that Title VII is the exclusive remedy for claims of employment discrimination in federal employment and that the plaintiff could not also sue under § 1981. The Court concluded that the administrative and judicial remedies of Title VII were intended to provide exclusive relief and rejected assertions that this system could coexist with other judicial action. The Court stated:

[12] The court of appeals subsequently remanded *Taylor* on this point, 524 F.2d 263, 274-75 (10th Cir. 1975), following the invitation of this Court's decision in *Johnson*, but did not provide any further analysis of or solutions to the practical problems discussed in the district court's opinion.

> Under the petitioner's theory, by perverse operation of a type of Gresham's law, § 717 [of Title VII], with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency were immediate access to the courts under other, less demanding statutes permissible.

425 U.S. at 833.[10] The *Brown* decision also expressed concern that the administrative role that Congress gave the enforcement agencies "would be eliminated 'by the simple expedient of putting a different label on [the] pleadings.'" *Id.*, at 833. The Court in *Brown* concluded that "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.*

*Johnson v. Railway Express* was distinguished in *Brown*—not on policy grounds—but on the fact that the legislative history of Title VII had recognized the existence of the right of private sector employees to sue under § 1981 but had seen no corresponding pre-existing right for federal employees. *Id.*, at 83. But this distinction in

[10] *Courts construing the Age Discrimination in Employment Act of 1967*, 29 U.S.C. § 621, *et seq.*, also have recognized that permitting claims for compensatory and punitive damages would interfere with statutorily-mandated conciliation. *See e.g., Rogers v. Exxon Research & Engineering Co.*, 550 F.2d 834, 840-41 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). The court noted that introducing the "vague and amorphous concept" of pain and suffering damages into the administrative setting "might strengthen the claimant's bargaining position" but it also would "introduce an element of uncertainty which would impair the conciliation process." 550 F.2d at 841. The court also noted that "[t]he possibility of recovering a large verdict for pain and suffering will make a claimant less than enthusiastic about accepting a settlement for only out-of-pocket loss in the administrative phase of the case." *Id.*

*Accord, Slatin v. Stanford Research Institute*, 590 F.2d 1292, 1296 (4th Cir. 1979); *Nation v. Bank of California*, 649 F.2d 691, 699 (9th Cir. 1981); *Dean v. American Security Insurance Company*, 559 F.2d 1036, 1038 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); and *Saut v. Mack Trucks, Inc.*, 424 F. Supp. 421, 422 (N.D. Calif. 1976).



no way solves the problems created by private sector § 1981 suits. It would be naive, at best, to think that § 1981 plaintiffs and their attorneys will be more likely to allow their claims to be pursued under Title VII's requirements merely because the employer operates in the private sector.

### 2. *The* Novotny *Decision*

The Court was bothered by identical concerns when it held that 42 U.S.C. § 1985(3) does not allow a private federal suit for an alleged conspiracy to deprive an individual of his Title VII rights. *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 372-78 (1979). There, the Court noted that if a private suit were permitted alongside Title VII, "[t]he short and precise time limitations of Title VII would be grossly altered." 442 U.S. at 376. And "[p]erhaps most importantly, the complaint could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII." *Id.*[11]

What this discussion shows, therefore, is that after years of consideration of the national problem of employment discrimination, Congress enacted Title VII as the primary means of enforcement. It also established a system of administrative requirements that was intended to avoid litigation where possible and to encourage the parties and the EEOC to resolve disputes through conciliation and voluntary compliance. Yet the current state of the decisional law is that, because Congress allowed § 1981 to be used against employment discrimination, the plaintiff need only file a § 1981 pleading in federal court to frustrate the entire Title VII scheme.

[11] *See also*, Shapiro, *Section 1981 Claims to Redress Discrimination in Public Employment: Are They Preempted by Title VII?*, 35 Am. U.L.Rev. 93, 112 (1985).

§ 1981 provides more protection than Title VII in defining what discriminatory conduct is prohibited under federal law. Indeed, it is Title VII that provides more protections, because, unlike § 1981, the EEOC and Title VII plaintiffs may proceed under the adverse impact theory and are not limited to the disparate treatment model. *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375 (1982); *Washington v. Davis*, 426 U.S. 229 (1976).

Charging parties, moreover, have little cause to complain about the way in which Title VII's procedural requirements have been interpreted since the Act was amended in 1972 and the EEOC's authority was expanded. Indeed, many of the concerns that Title VII's technical requirements would adversely affect individual rights have proven to be unfounded. For example, Title VII's charge-filing requirement is *not* a jurisdictional prerequisite and, like § 1981's period, is subject to waiver, estoppel and equitable tolling.[16] Also, the limitations period gap between the two statutes has been narrowed substantially.[17] Moreover, charging parties may receive an award of attorney's fees under Title VII for work done in connection with administrative proceedings following reference to a state agency.[18]

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*grounds*, 534 F.2d 1007 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977); and *United States v. East Texas Motor Freight System*, 564 F.2d 179, 185 (5th Cir. 1977) (same re Executive Order 11246).

[16] *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

[17] *EEOC v. Commercial Office Products Company*, 56 L.W. 4424 (U.S. May 17, 1988), virtually eliminated the 180-day filing period for Title VII. The Court held that the extended 300-day period applies in a deferral state even though an individual has not filed a timely 180-day charge with the state agency as required under state law. By contrast, *Goodman v. Lukens Steel Co.*, 107 S.Ct. 2617, requires that § 1981 suits are governed by the state personal injury statute of limitations period, which typically is much shorter than the contract suit limitations period sought by § 1981 plaintiffs.

[18] *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).



### F. Title VII Is Being Interpreted And Enforced In A Manner That Protects The Rights Of Charging Parties Consistent With Federal Antidiscrimination Policy

As this Court has recognized repeatedly, Title VII's legislative history demonstrates that its detailed administrative/judicial enforcement machinery was carefully designed to balance the competing interests involved in an employment discrimination complaint. *See, e.g., Occidental Life Insurance Co. of California v. EEOC*, 432 U.S. at 355, 359, 372-73. Delegation of enforcement authority to the Commission shifts the burden of prosecution from the individual complainant, assures employees that the agency issuing discrimination guidelines will also be the agency enforcing compliance, and encourages the settlement of disputes through informal conciliation rather than formal judicial proceedings. *See* Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L.Rev. 1109, 1200, 1270 (1971).

Ultimate resort to the federal courts also delegates the task of investigation and fact-finding to the agency that has the specialized knowledge and resources to do so, while insuring that the private claimant will receive the most complete relief possible. Sape & Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L.Rev. 824, 881 (1972).

In addition, potential substantive conflicts between Title VII and § 1981 have been resolved in favor of those standards adopted by Congress in Title VII—even when specific exempting language of Title VII has not been found in § 1981.[15] Thus, there can be no argument that

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[15] *See e.g., Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1316, 1320 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976) (seniority system that is valid under Title VII cannot be attacked under § 1981); *United States v. Trucking Management, Inc.*, 662 F.2d 36 (D.C. Cir. 1981); *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), *mod. on other*

EEOC investigations, of course, can be an extremely effective enforcement method. To illustrate, the EEOC's investigatory and subpoena enforcement authority has been applied much more broadly than would be available to the individual § 1981 plaintiff.[19] And should the EEOC decide not to sue, for whatever reason, the information developed in its investigation is available to the charging party and his attorneys once a private Title VII court suit is filed. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981). See also, the discussion above at pp. 12-13.

The Court also should be aware of several relatively recent initiatives adopted by the EEOC to increase substantially the advantages to charging parties of proceeding under Title VII. First, effective August 1, 1987, the EEOC implemented a final rule permitting charging parties to appeal "no-cause" determinations issued by the agency's district directors. See 29 C.F.R. Part 1601.19. This procedure was adopted to assure that agency investigations were impartial, thorough, legally sound, professional, and conducted in a manner that would minimize the need for charging parties to sue without EEOC assistance.

Also, on February 5, 1985, the EEOC adopted a *Policy Statement on Remedies and Relief for Individual Victims of Discrimination*, 8 Fair Empl. Prac. (BNA), 401:2615-401:2618. This policy was adopted in response to concerns that cases may be settled with less than full relief for discrimination victims. The policy provides for: full (not partial) back pay; enhanced reinstatement or placement rights; new notice posting requirements to inform other employees of discrimination problems; and potential direct disciplinary action against offending supervisory personnel.

In conjunction with its enhanced remedial policy, the EEOC also has adopted tougher policies and procedures for dealing with recalcitrant employers and in seeking subpoenas.[20] Under these policies, when an employer fails to comply with requests for information in a timely or complete manner, EEOC district directors are directed to take one or more actions. These include: immediate issuance of a subpoena; proceeding more directly to litigation; and drawing an adverse inference against a respondent as to the evidence sought when records are destroyed or not maintained.

[19] *EEOC v. Shell Oil Company*, 466 U.S. 54 (1984).



Moreover, when the EEOC decides to sue an employer, it may do so unencumbered by the class action limitations of Rule 23 of the Federal Rules of Civil Procedure.[21] As this Court noted, by expanding the EEOC's enforcement powers in 1972, "Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. . . . The EEOC was to bear the primary burden of litigation, but the private action previously available under § 706 [of Title VII] was not superseded." 446 U.S. at 325-36.

Further, "EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." 446 U.S. at 331. EEOC also may proceed unencumbered by Rule 23's requirement that an individual's claim be typical of other class members.[22] *Id.* And when the district court finds that discrimination has occurred, it "has not merely the power but the duty to render a decree which will *so far as possible* eliminate the discriminatory effects of the past as well as bar like

[20] *See* 29 C.F.R. 1601.16(b)(1) and (2) [subpoenas]; and EEOC: Investigative Compliance Policy, 8 Fair Empl. Prac. (BNA) 401:2625-40:2626.

[21] *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980).

[22] *Compare, General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982) (applicant cannot be class representative for incumbent employees).

discrimination in the future." *Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975) (emphasis added).

Accordingly, EEOC-brought Title VII actions benefit the public interest, rather than purely private concerns, in many ways that § 1981 suits do not. Individual plaintiffs, quite frankly, often are motivated primarily by an attempt to extract the maximum possible monetary award or settlement, unencumbered by administrative requirements intended to eliminate discrimination on a broader scale by the involvement of an expert agency designed to give assistance to *all* victims of discrimination.

## CONCLUSION

As the discussion above indicates, the emphasis in § 1981 on maximum individual relief encourages plaintiffs to by-pass Title VII, thereby negating the ability of the EEOC to seek relief for all victims through its enhanced ability to investigate beyond an individual problem and then to conciliate charges of discrimination. EEAC urges the Court to use this case as a vehicle to explicate these practical considerations and to emphasize that the dichotomy between these coexisting remedial schemes often impedes in the proper functioning of the nation's civil rights laws.

Respectfully submitted,

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